

In the Supreme Court of the United States

OCTOBER TERM, 1978

BRENT HARELSON, PETITIONER

v.

UNITED STATES OF AMERICA

DENNIS L. LIPPER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

CHARLES A. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-591

BRENT HARELSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-638

DENNIS L. LIPPER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 78-769

CHARLES A. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

(1)

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)¹ is reported at 575 F.2d 1347.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1978. Petitions for rehearing were denied on September 11, 1978. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari in No. 78-769 to November 10, 1978. The petition in No. 78-591 was filed on October 10, 1978, the petition in 78-638 was filed as of October 5, 1978, and the petition in No. 78-769 was filed on November 8, 1978.

QUESTIONS PRESENTED

1. Whether the trial court erred by refusing to instruct the jury that commission of an overt act is an essential element of a conspiracy to import a controlled substance, in violation of 21 U.S.C. 952 and 963.

2. Whether the trial court abused its discretion by qualifying an expert witness to testify on the national origin of marijuana.

3. Whether Fed. R. Evid. 801(d)(2)(E), providing for the admission of declarations of co-conspirators, violates the Confrontation Clause of the Sixth Amendment.

¹ "Pet. App." refers to the appendix to the petition in No. 78-591.

4. Whether the evidence supported petitioner Johnson's conviction for engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

5. Whether there was a prejudicial variance between the bill of particulars and the proof at trial concerning the identities of the individuals organized, supervised, or managed by petitioner Johnson during the continuing criminal enterprise.

STATUTE INVOLVED

21 U.S.C. 848(b) provides:

Continuing criminal enterprise defined.

* * * a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT

After a jury trial in United States District Court for the Northern District of Florida, petitioners were

convicted on one count of conspiracy to import marijuana, in violation of 21 U.S.C. 952 and 963, and (except for petitioner Storey) on one or more substantive counts of importing marijuana, in violation of 21 U.S.C. 952(a). In addition, petitioner Johnson was convicted for engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Johnson was sentenced to concurrent terms of five years' imprisonment on the two importation counts, a consecutive term of five years' imprisonment on the conspiracy count, and a consecutive term of ten years' imprisonment on the continuing criminal enterprise count, all to be followed by a special parole term of three years. Petitioner Harelson was sentenced to concurrent terms of four years' imprisonment on the conspiracy count and one importation count, and a special parole term of three years. Petitioners Lipper and Schlager were sentenced to concurrent terms of five years' imprisonment on the conspiracy count and one importation count, and a special parole term of three years. Petitioner Storey was sentenced to five years' imprisonment and a special parole term of three years. The court of appeals vacated Johnson's conspiracy conviction in light of this Court's opinion in *Jeffers v. United States*, 432 U.S. 137 (1977), but otherwise affirmed (Pet. App. A).²

² The court of appeals also reversed the conspiracy conviction of one defendant, Jesse Roscoe Storey, on the ground of insufficient evidence. Another defendant, Kenneth Vance, was acquitted by the jury.

As detailed in the opinion of the court of appeals (Pet. App. A2-A10), the evidence showed that petitioner Johnson was the central figure in a continuing conspiracy to import Colombian marijuana into the United States between July 1, 1971, and December 31, 1974. During this time, marijuana was imported on four separate occasions: in January 1972 at Interarity Point, Florida; in June 1972 at Orange Beach, Alabama; in December 1972 at St. Marks, Florida; and in November 1973 at St. George Island, Florida.

In the summer of 1971, John de Pianelli (the principal government witness at trial) and petitioner Harelson put up "front money" to finance a shipment of marijuana after Johnson said that he had formed a partnership with an individual who would obtain marijuana and ship it from Colombia (X R. 12-15).³ Thereafter, when the marijuana arrived at Johnson's house in Interarity Point, de Pianelli and Harelson each received a share of the shipment, which they distributed individually. Petitioners Lipper and Schlager also received shares of this shipment (X R. 22-23). Captain Larry Storey brought the marijuana from Colombia to Florida on his shrimp boat (X R. 25-26).

Using the proceeds from the sale of the Interarity Point shipment, Harelson and de Pianelli gave Johnson more front money to finance a second marijuana shipment (IX R. 80-90). Thereafter, de Pianelli and

³ "R." refers to the volumes of the record in the court of appeals.

Harelson drove back to Johnson's house at Interarity Point, where Lipper, Schlager, George Driver, David Barca, and Johnson were present (IX R. 95, 99-101). Johnson explained that the shipment of marijuana was on the way from South America by boat and that it was to be delivered at a house that he had rented in Orange Beach, Alabama. Johnson stated that repeated use of the Interarity Point house would attract attention (IX R. 103, 111-114).

De Pianelli and Harelson then drove to the house at Orange Beach, where the marijuana arrived on a skiff with J. Moen and Gary Vance on board (IX R. 119-120). Moen said that the skiff had disembarked from another vessel, the "Decatur," which had come from South America and was captained by Larry Storey, with a crew including one or both of his sons, petitioner Larry Storey, Jr., and Jesse Storey, and Mathew Moen (IX R. 128-130). After the skiff was hidden, the men drove to the Interarity Point house. That night, Johnson, Harelson, Lipper, Schlager, and the others at the Interarity Point house returned to Orange Beach to unload the skiff (IX R. 124-125). While Johnson supervised the weighing and allocation of the marijuana, the others helped in unloading it (IX R. 126-128). After the marijuana had been separated, Johnson told Schlager, Lipper, Driver, Harelson, and de Pianelli that there would soon be another importation (IX R. 142). The individuals then left to distribute the marijuana.

Later in the summer of 1972, de Pianelli met with Johnson in California to give him additional front

money to finance a third shipment of marijuana (IX R. 146). In December 1972, Johnson, de Pianelli, Harelson, Schlager, Lipper, Driver, Barca, and Moen met at a fishing camp in St. Marks, Florida, which Johnson had rented as the new base for the operation (IX R. 146-148; XI R. 221-225). A skiff owned by Johnson and modified at a boatyard under his instructions (IX R. 152-155; XII R. 72-82) was used by Schlager and Lipper to contact the vessel carrying the marijuana and bring the shipment ashore (IX R. 155-158). De Pianelli and the others formed a human chain to unload the bales of marijuana from the skiff. Again the marijuana was weighed, using the same scale as at Orange Beach, and distributed among the various men (IX R. 152, 158-160, 165-169, 173-174).

In the spring of 1973, Johnson, Lipper, Schlager, and de Pianelli met at Johnson's house at Interarity Point to discuss yet another shipment of marijuana. Johnson said that 5-6 thousand pounds of high quality marijuana were in storage in Colombia. J. Moen was making arrangements to send it on a ship from Colombia to the Gulf of Mexico, where it would again be transferred to the "Decatur" for carriage ashore. He also stated that Captain Storey and his two sons, Jesse and Larry, were to be aboard the "Decatur" (IX R. 183-185, 188-193, 235). De Pianelli paid \$30,000 for a share of the load (IX R. 194). Thereafter, in early December 1973, the load was transported to the United States according to plan and brought ashore at a house that Johnson had purchased on St. George Island, Florida (IX R. 211-219; XII

R. 64-67). Because the load was larger than expected, Johnson gave de Pianelli \$156,000 worth of marijuana in addition to the share that he already had purchased (IX R. 220-221).

Three weeks later, de Pianelli returned to St. George Island and made a \$25,000 partial cash payment to Johnson (IX R. 236, 238), at which time Larry Storey, Jr., commented that he had been down in Colombia with the load (IX R. 236-237). However, when de Pianelli was unable to pay the rest of the money that he owed Johnson, Bill Lawrence and Larry Storey, Jr., assisted Johnson in coercing payment from him (IX R. 244-256; XII R. 139-144; XIII R. 62-63).⁴

ARGUMENT

1. Contrary to petitioner Harelson's assertion (78-591 Pet. 3-6), there is no significant difference among the circuits on the question whether a defendant, charged under a special conspiracy statute such as 21 U.S.C. 963 (which—in contrast to 18 U.S.C. 371—does not specify commission of an overt act as an

⁴ Afterwards, Lawrence continued to work for Johnson (XIII R. 7). In the summer of 1974, Johnson told him of plans for a further marijuana importation scheme. Under that plan, Lawrence was to meet with Lipper and J. Moen at the St. George Island house (XIII R. 8-12). However, when Lipper and J. Moen arrived at St. George Island and discovered that the house was under surveillance by law enforcement officers, the proposed project was called off (XIII R. 12). Thereafter, Johnson told Lawrence that the load "was disposed of at sea, in the sense it was sold somewhere else" (XIII R. 12, 16).

element of the offense), is entitled to an instruction requiring proof of an overt act as a precondition to conviction.⁵ Only the Tenth Circuit unequivocally requires such proof. *United States v. King*, 521 F.2d 61, 63 (1975).⁶ In accordance with the common law, on the other hand, this Court and seven circuits have held that, if a conspiracy statute does not provide that commission of an overt act is an element of the offense, an overt act need not be pleaded or proved. *Singer v. United States*, 323 U.S. 338, 340 (1945); *Fiswick v. United States*, 329 U.S. 211, 216 n.4 (1946); *Nash v. United States*, 229 U.S. 373, 378 (1913); *United States v. DeJesus*, 520 F.2d 298, 301 (1st Cir.), cert. denied, 423 U.S. 865 (1975); *United States v. Bermudez*, 526 F.2d 89, 94 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); *United States v. Dreyer*, 533 F.2d 112, 117 & n.6 (3d Cir. 1976);

⁵ 21 U.S.C. 963 punishes "[a]ny person who attempts or conspires to commit any offense defined in this subchapter * * *." The general conspiracy statute, 18 U.S.C. 371, in contrast, provides in relevant part: "If two or more persons conspire * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be [punished]."

⁶ *King* stated a rule that while an overt act need not be alleged, a defendant is nevertheless entitled to an instruction requiring proof of an overt act because a conspiracy is not complete—and hence punishable—unless an overt act is committed. 521 F. 2d at 63. Completion by means of an overt act, however, is not one of the elements of the offense under 21 U.S.C. 963. Moreover, at common law no overt act was required. See *Nash v. United States*, 229 U.S. 373, 378 (1913); *Singer v. United States*, 323 U.S. 338, 340 (1945). An overt act must be proved under the general conspiracy statute only because the statute in terms requires such proof.

United States v. Palacios, 556 F.2d 1359, 1364 n.9 (5th Cir. 1977); *United States v. Burts*, 536 F.2d 1140, 1141 (6th Cir. 1976), cert. denied, 429 U.S. 1044 (1977); *United States v. Umentum*, 547 F.2d 987, 989-991 (7th Cir. 1976), cert. denied, 430 U.S. 983 (1977); *Ewing v. United States*, 386 F.2d 10, 15 (9th Cir. 1967), cert. denied, 390 U.S. 991 (1968).⁷ Moreover, to the extent that resolution of the conflict between the Tenth and the other circuits might be thought desirable, this case presents an inappropriate vehicle for that purpose, since the guilty verdicts on the substantive importation counts constituted direct findings by the jury that numerous overt acts had in fact been committed in furtherance of the conspiracy. Thus, even if the instructions on the conspiracy charge were insufficient, the defect was merely a technical one that could not have affected the verdict in any respect.

⁷ Harelson supports his contention that the Sixth Circuit requires proof of an overt act, and that the First and Third Circuits have not reached the issue, by citing cases decided by those circuits prior to the decisions—*Burts*, *DeJesus* and *Dreyer*—that we have cited in the text (*supra*). Moreover, one of the Sixth Circuit cases upon which he relies, *Singer v. United States*, 208 F. 2d 477 (1953), involved—as did his Fourth Circuit citation, *Harms v. United States*, 272 F. 2d 478 (1959)—a conspiracy charge brought under the general conspiracy statute. *United States v. Williams*, 503 F. 2d 50, 54 (1974), his other Sixth Circuit citation, and *United States v. Hutchinson*, 488 F. 2d 484, 490 (1973), his Eighth Circuit citation, are cases in which the requirement of an overt act was merely assumed, and that assumption was based on cases involving the general conspiracy statute. See *United States v. Umentum*, *supra*, 547 F. 2d at 990.

2. At trial, de Pianelli testified on voir dire that he had smoked marijuana over a thousand times, had been called upon to identify marijuana by its origin over a hundred times and had done so without error, had been involved in approximately twenty marijuana transactions, and had compared Colombian, Mexican and Jamaican marijuana more than twenty times (X R. 40-42, 52, 61-64). He explained that the origin of marijuana could be identified by the appearance of the leaf, buds, seeds, and stem and by the taste and smell of the smoke (X R. 42), with Colombian marijuana being distinctive because of its high resin content and the compactness and smallness of its flowers and buds (X R. 51-52, 56, 77-79). He added that Colombian marijuana grown in this country is distinguishable from that which is imported by a harsher smoke, less resin, and the absence of a burlap-like taste (X R. 79-80), and that he had compared imported and American-grown Colombian marijuana on ten different occasions without a mistake in identification (X R. 80). De Pianelli was then qualified as an expert and permitted to testify that, based on his sensory evaluation, the marijuana received in each shipment was of Colombian origin (X R. 81-87).

Petitioners argue (78-638 Pet. 22-28) that the trial court abused its discretion by qualifying de Pianelli as an expert on the origin of marijuana, both because the subject matter was not a proper subject for expert opinion and because de Pianelli's expertise was

not sufficiently established.* However, Rule 702, Fed. R. Evid., expressly provides that a witness may be "qualified as an expert by * * * experience" as well as special training. Moreover, the trial court has broad discretion in passing on the qualifications of an expert and the admissibility of his testimony, and its ruling will only be reversed if it is "manifestly erroneous." See *United States v. Bolts*, 558 F.2d 316, 322 (5th Cir. 1977); *United States v. Viglia*, 549 F.2d 335, 337 (5th Cir. 1977). Here, as the court of appeals correctly noted (Pet. App. A26-A29), the source of marijuana was a proper subject for expert testimony, and the extensive voir dire examination "revealed that [de Pianelli's] substantial experience in dealing with marijuana included identification of Colombia marijuana" (*id.* at 27). Petitioners were, of course, free to impeach de Pianelli's credibility through cross-examination and rebuttal, which they attempted to do (see 78-638 Pet. 7-8). Accordingly, the trial court did not abuse its discretion in admitting de Pianelli's expert testimony. See *United States v. Bermudez*, 526 F.2d 89, 97-98 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); *United States v. Almada-Aldama*, 462 F.2d 952 (9th Cir. 1972); *United States v. Warner*, 441 F.2d 821, 831 (5th Cir. 1971).

3. Petitioners also contend (78-638 Pet. 9-21) that Rule 801(d)(2)(E), Fed. R. Evid., which permits the

* In the court below, petitioner Lipper conceded (77-5327 Lipper Br. 7), however, that de Pianelli was competent to identify the marijuana.

jury to consider hearsay declarations of co-conspirators made during the course of and in furtherance of the conspiracy, violates the Confrontation Clause of the Sixth Amendment. As the court of appeals properly noted (Pet. App. A30), this argument is frivolous in light of *Dutton v. Evans*, 400 U.S. 74, 80-82 (1970). See also *United States v. Nixon*, 418 U.S. 683, 701 (1974); *Anderson v. United States*, 417 U.S. 211, 218 (1974).

4. Johnson raises a two-part argument against his conviction for engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848. First, he claims that the government, in response to his motion for a bill of particulars, had indicated that his co-defendants were not included among the persons whom he managed, supervised, or organized within the meaning of Section 848(b)(2)(A). Second, he contends that none of the other persons involved in the conspiracy^o were so managed, supervised, or organized, because there was no showing that they were subservient to him (78-769 Pet. 22-48).

^o The court of appeals found that petitioner Johnson acted in concert with six individuals other than his co-defendants—Captain Storey, Moen, Driver, Barca, di Pianelli, and Lawrence (Pet. App. A20). Johnson claims, however, that Lawrence must be excluded from the list because he was not involved in any of the four shipments. But Lawrence's activities all occurred within the 3½ year period in which the continuing criminal enterprise occurred. Moreover, the collection of the money de Pianelli owed Johnson was clearly part of the continuing criminal enterprise, and Lawrence assisted in that collection effort. Finally, Lawrence was involved with Johnson and others in a later unsuccessful importation effort that was also part of the continuing criminal enterprise (see note 4, *supra*).

Both arguments are based on an erroneous reading of the definitional section of Section 848. As the court of appeals pointed out (Pet. App. A20), and as we have detailed in the statement above, Johnson arranged each of the four completed importations (as well as the final aborted importation), accumulated the necessary front money, coordinated activities with his partner in Columbia, acquired the sites and the boats to facilitate the importation, and acted as a general coordinator of activities at each importation site. This was sufficient to place him in the position of an organizer with respect to the various individuals who participated in the importations. As the court of appeals noted, it was not necessary, to satisfy the statutory definition, that Johnson conduct the importation activities "with the regimentation of a G3 Section in the United States Army" (*ibid.*).

For similar reasons, Johnson's bill of particulars argument lacks merit, even assuming *arguendo* that there was a variance between the bill of particulars and the proof.¹⁰ A variance between a bill of particu-

¹⁰ It is not at all clear that there was any variance. In his oral response to the motion for a bill of particulars, the prosecutor specified as "organizees" four Spanish-surnamed individuals named in other counts but not in the continuing criminal enterprise count and "other people that are not named in the indictment" (VII R. 48-49). Other co-defendants were thus inferentially excluded from the "organizee" group because they were charged as organizers in the continuing criminal enterprise count. At the close of the government's case, that count was dismissed as to all defendants except Johnson. In denying Johnson's motion to dismiss the count as to him, the district court described the persons whom Johnson had

lars and the government's proof is fatal only if the defendant is prejudiced thereby in the preparation of his defense. *United States v. Horton*, 526 F.2d 884, 887 (5th Cir. 1976). Johnson claims prejudice on the ground that, had he known that his co-defendants were included among the "organizees," he would have sought to show—by cross-examining de Pianelli or by calling his co-defendants as witnesses after obtaining a severance—that his co-defendants did not occupy a subservient relationship to him.¹¹ The short answer to this is that Johnson's guilt did not require "subservience" on the part of those with whom he acted and only required organizational activities on his part

organized: "[w]e have each of the defendants on trial here—we have a bunch of them right around and we have de Pianelli, we have got Moen, we have others, I think there is much more than five here involved" (XIII R. 95). In its instructions to the jury, however, the court did no more than refer to the statutory definition, without specifying who the necessary five persons might be (XVI R. 162-163). In his closing argument to the jury, the prosecutor merely referred to "Mr. de Pianelli, Mr. Moen, Barka, Driver and these other people that were involved in this enterprise" (*id.* at 41).

¹¹ Johnson's argument based on a possible "severance" is entirely speculative. He has shown neither that his co-defendants would have been willing to testify on his behalf in a separate trial without asserting their Fifth Amendment privilege (see *United States v. Nakaladski*, 481 F. 2d 289, 301-302 (5th Cir.), cert. denied, 414 U.S. 1064 (1973)), nor that testimony by them regarding their relationship to him would have been sufficiently trustworthy and significant to warrant a severance. See *United States v. Alfonso*, 552 F. 2d 605, 616 (5th Cir.), cert. denied, 434 U.S. 857 (1977); *United States v. Alejandro*, 527 F. 2d 423, 428 (5th Cir.), cert. denied, 426 U.S. 923 (1976).

(which were clearly shown). Thus, evidence of lack of subservience of his co-defendants would have been irrelevant and immaterial in any event. Moreover, Johnson was placed on notice that his co-defendants were no longer viewed as "organizers" and might be considered to be "organizees" when the Section 848 charges were dismissed against them. See *United States v. Rivero*, 532 F.2d 450, 456-457 (1976). And, if Johnson wished to question de Pianelli further on the subject of "subservience," he was free to recall him to the witness stand.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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